



# Non-Recourse Litigation Funding: a Transformative Tool for General Counsel

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# Non-Recourse Litigation Funding: a Transformative Tool for General Counsel

General Counsel can have responsibility for a broad and varied range of duties depending on the size of their company, the type of business it conducts and the jurisdictions in which it operates. Invariably, however, General Counsel are accountable to their board of directors and shareholders for mitigating risk and protecting the legal rights of the company, including managing litigation proceedings needed to recover remedial damages for any infringement of those rights.

Non-recourse litigation finance serves as a transformative tool for General Counsel to overcome this quandary, and advise their board of directors on the prospect of an offensive litigation as a business opportunity rather than an expense liability risk.

Unprecedented times in the post-pandemic world will force companies and their General Counsel to confront countless new challenges to their business. The volatility of the current economic environment has



The decision whether to initiate a lawsuit can have significant consequences for the company's finances and will often pose a difficult dilemma for General Counsel. As any litigant is acutely aware, the litigation process is often an elongated and expensive endeavor with the ultimate costs for access to justice being quite unpredictable and unwieldy. As such, General Counsel frequently face a conundrum whether to risk the company's finite financial resources chasing after an elusive defendant, even in cases where the injury to the company has been severe. It involves a multi-faceted cost-benefit analysis that sometimes results in a decision not to pursue a compelling claim that may actually be a very valuable asset.

already required corporations to re-evaluate financial forecasts, compelling many to curtail expenses, while simultaneously seeking to unlock value from under-utilised resources. Cost-cutting measures and identifying latent assets may not necessarily be within the traditional scope of the legal department, but General Counsel can add immense value to their company's bottom line by working with their Chief Financial Officer and executive team to advise the company's board of directors on how non-recourse litigation finance for meritorious claims can help accomplish both of these objectives.

## What is litigation funding?

Litigation funding (also known as litigation finance) involves a third-party paying some or all of the expenses of a company's legal claim in exchange for a share of the proceeds recovered from the resolution of the matter. These transactions are especially attractive to companies and General Counsel because of their non-recourse nature, meaning that if there is no financial recovery from the dispute, then

there is no obligation to return the funder its advances or pay any profit on the funder's investment. It is the risk-free aspect of these arrangements for the claimant that can make a litigation claim supported by a finance facility one of the company's most under-appreciated assets and turn its legal department from what has historically been perceived as a cost centre into a lucrative revenue stream.

## Corporate Finance but Non-Recourse

While litigation funding is still relatively new to the legal market, it could be viewed as just another form of corporate finance with the company's legal claims serving as the collateral for the advances. Unlike traditional credit arrangements, with non-recourse funding, the litigation claims are the only source of repayment to the funder. The reason that a litigation funder is able to offer financing which is recourse only to the litigation claims when a banking institution will not, is because litigation funders are experts at evaluating legal risks and are able to recognise the expected value of the claims on a probabilistic basis. Banks and other more traditional financiers simply do not have the litigation expertise to underwrite the merits of the claim or the competency of litigation counsel. As such,

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their credit guidelines require borrowers to make payment regardless of the outcome of the dispute and may even demand a blanket security interest on all of the company's assets. If the company is already highly leveraged with secured debt, it will be restricted from granting the liens needed to obtain the additional recourse-credit. This makes bank debt to finance litigation too risky, and in some cases, simply not possible for the company and its General Counsel.



## Covers a Variety of Commercial Claims

Non-recourse litigation funding can be used by General Counsel to support a wide variety of legal claims. These include intellectual property disputes, business tort actions, contractual breaches, international arbitration and antitrust litigation. Many litigation funders will also underwrite facilities to monetise judgments and/or fund the appeals process. In general, litigation funders, like Woodsford, will consider any

meritorious claim of £5m or more with financing needs of £500,000 and up, so long as there is a ratio of 10:1 between the quantum and the funding requirement. In all cases, funders will closely analyse the evidentiary support for the strength and value of the claim, along with the anticipated defenses and counterclaims, to predict the probability of a successful resolution.

## A Bounty of Benefits to General Counsel

If a litigation funder determines that a claim has sufficient merit and value to support a finance transaction, it will structure a bespoke facility that meets the specific needs of the case and the claimant. A properly structured litigation finance transaction can offer a bounty of benefits to General Counsel:

### 1. Transfer Risk and Costs Off the Balance Sheet

General Counsel are fully aware of the negative impact that litigation can have on their company's financial statements. Claims are not recorded as assets on the company's balance sheet but the expense

of paying lawyers and out-of-pocket litigation costs are most definitely included as liabilities.

With the support of a non-recourse litigation finance facility, General Counsel can protect the company's legal rights while transferring liabilities off the company's balance sheet.

Because non-recourse finance doesn't require a monetary commitment from the company, General Counsel can more easily make the business case to their Finance department and board of directors that the litigation will be in the company's best



interest and the worst-case scenario will deliver no financial downside. General Counsel sitting on a potentially valuable claim may even have a fiduciary duty to their board of directors and shareholders to explore non-recourse litigation finance options available to the company in order to advance its legal claims with no, or limited, financial exposure.

## 2. Hire the Best Lawyers

Having the support of a litigation funder allows General Counsel to choose the litigation lawyers that are best-equipped for the case at hand. Litigation is often a prime example of the axiom, ‘you get what you pay for’ and armed with a fully-budgeted non-recourse finance facility to advance the company’s legal claims, there will be no need for General Counsel to be a bargain shopper when it comes to selecting litigation counsel. Also, for claimants who have yet to engage a law firm or need to add local or specialised counsel, a well-established funder like Woodsford with a deep network of world-class legal practitioners, can make introductions to a law firm best-suited to represent the company. It is undeniable that the probability of a successful litigation is largely dependent on the experience and skills of the lawyers and by working with a well-resourced litigation funder, General Counsel can afford to pay for the best of the best.

## 3. Second Set of Seasoned Eyes

General Counsel can also use litigation finance as a no-cost means of validating the company’s claims. If an objective, economically rational litigation funder is willing to deploy its investment capital into the action, it provides confirmatory support for the merits of the claims. Litigation funders, like Woodsford, undertake a rigorous diligence process that involves many hours of expert legal and financial review and analysis before an investment approval can be obtained. An unbiased validation from a team of experts at a developmental stage of the litigation can

greatly enhance the strategy and the value of the case.

## 4. Support From Start to Finish

Litigation funders can offer support to General Counsel throughout the litigation and help to control the costs of the proceedings. Funders, like Woodsford, have extensive experience structuring law firm engagements and can assist General Counsel with negotiating a more attractive arrangement with the law firm to include discounts and more importantly caps, on attorneys’ fees. Reputable litigation funders will always remain strictly passive investors with General Counsel continuing to retain complete control and decision-making authority over the company’s claims. However, funders with a staff of legal experts who are deeply experienced in their litigation specialties can provide an extra layer of valuable expertise throughout the process, from determining the optimal jurisdiction in which to file the complaint through the final resolution of the dispute and collection of the recovery.

*“They are very helpful in supporting you in the case. They consider themselves an investor, but also serve as a consultant and supporter of a case they are invested in. I like that very much.”*

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## 5. Changing the Dispute Dynamics

Working with a well-resourced litigation funder can have substantial strategic benefits and change the dynamics of a dispute. General Counsel who secure a finance facility will often be able to achieve a better and quicker settlement outcome for their company than an unfunded claimant who is more likely to feel financial pressure to accept a low settlement offer. Further, the support of a sophisticated professional funder, such as Woodsford, sends a powerful signal to a tribunal and the

defendant that an objective third party with substantial expertise and experience in disputes, is willing to risk its own capital (on a non-recourse basis) because of the merits of the underlying claim and the prospects of making a recovery.

In conclusion, even before these unprecedented times, the General Counsel's role was broad and varied and focused on mitigating risk. For many General Counsel, the option to invest significant company resources into lengthy, costly and uncertain offensive claims simply did not exist. However, legal claims are often business opportunities and now, more than ever, it is imperative for General Counsel to advise their companies of the availability of litigation finance to unlock the value of these opportunities.

General Counsel can report to their management team on how litigation finance can be used to pursue potentially lucrative claims with the best lawyers and high-profile firms, allowing the case to be fully resourced through to trial. Moreover,

*“I’ve never had a case where Woodsford did not reach an agreement in reasonable time and to the satisfaction of all parties”*

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with the support of an experienced litigation funder, the company will be adding an extra level of diligence and sending strong signals to the defendants that it has the financial resources to stay the course. Most importantly, General Counsel can illustrate how, with litigation finance, these claims can now be pursued at no additional cost or risk to the company.

As one of the leading global litigation funders, Woodsford is flexible and innovative in the financial solutions we deliver.

We are glad to discuss how a structured non-recourse funding facility could benefit General Counsel and their companies.



## About the authors



**Yoav Navon**, in his role as a Director of Litigation Finance, Israel, helps introduce leading Israeli law firms and their clients to Woodsford's full range of litigation finance solutions.

Yoav has extensive experience in commercial litigation and arbitration over a broad spectrum of sectors, having acted in the commercial, industrial and governmental disputes, before different legal instances tribunals, including all Israeli courts, arbitrators and mediators.

Prior to joining Woodsford, Yoav was an Associate at Ron Gazit, Rotenberg in Tel Aviv, where he represented clients across a range of areas, including intellectual property, media, antitrust and environmental disputes.

Yoav is a graduate of the University of Bar Ilan, where he obtained a Bachelor of Laws degree (Hons). Yoav also did a period of study abroad at the Monash University in Prato, Italy.

In June 2020 Yoav was recognized by Who's Who Legal as a 'Thought Leader' in third-party funding, the only individual recognized in Israel.

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**Alex Lempiner** is Executive Vice President, General Counsel and Secretary for Woodsford US. In this role, Alex oversees the corporate and legal matters affecting the Company in the United States. Leveraging more than 20 years of legal and industry experience, Alex is a strategic partner who is passionate about litigation funding and levelling the playing field to offer access to justice for those who need it most.

Alex began his legal career in the Global Corporate Finance Group of the international law firm, Milbank LLP, in its New York office. During his 6 years at Milbank, Alex represented administrative agents, lenders and borrowers in a wide range of syndicated financings and capital markets transactions.

Alex left Milbank to join Coventry First, LLC, where, as the company's first in-house lawyer, he helped to grow Coventry into the undisputable leader in the life settlement market. As Senior Vice President and the Chief Compliance Officer, Alex managed all operational matters, implemented company-wide processes to ensure regulatory compliance and structured, drafted and negotiated credit facilities for various life insurance products.

After 12 years with Coventry, Alex decided to join Rembrandt IP Management, LLC, a Philadelphia-based investment firm, to help the company build its litigation funding operations. As Corporate Counsel and Secretary, Alex had responsibility for all corporate governance and legal matters and drafted and negotiated all of the company's transaction documents while coordinating investment diligence and voting on final investment decisions.

Alex obtained his Bachelor of Arts in Pre-Law from The Pennsylvania State University where he was admitted into the Phi Beta Kappa Honor Society and his Juris Doctorate from New York University School of Law. He is licensed to practice law in New York and Pennsylvania.

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## About Woodsford

Founded in 2010 and with a presence in London, Philadelphia, New York, San Francisco, Toronto, Singapore, Brisbane and Tel Aviv, Woodsford provides tailored litigation financing solutions for businesses, individuals, and law firms. This includes both single case and portfolio litigation funding and arbitration funding and the funding of collective actions. Woodsford's Executive

team blends extensive business experience with world-class legal expertise. Woodsford is a founder member of the Association of Litigation Funders of England and Wales.

For further information, visit [www.woodsfordlitigationfunding.com](http://www.woodsfordlitigationfunding.com) or email **Yoav** ([ynavon@woodsfordlf.com](mailto:ynavon@woodsfordlf.com)) or **Alex** ([alempiner@woodsfordlf.com](mailto:alempiner@woodsfordlf.com)) directly.